Supreme Court, U.S.
FILED
JAN 17 2001

(2)

No. 00 - 1055

IN THE

Supreme Court of the United States

October Term 2000

SPHERE DRAKE UNDERWRITING MANAGEMENT LTD.,
Petitioner,
v.
ROYAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Cecil L. Solomon
Counsel of Record
Billings & Solomon, P.C.
460 Riviana Building
2777 Allen Parkway
Houston , Texas 77019 - 2129
(713) 528 - 2111
(713) 528 - 0980 (facsimile)

Attorney for Respondent

17 pp

QUESTION PRESENTED FOR REVIEW

Whether an excess carrier, where the insurers' coverage is in the nature of layers, should recover under subrogation before primary insurers can be reimbursed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT 3

I. THE TEXAS COURT WAS CORRECT IN APPLYING STATE LAW 4

II. FUTURE CURE ISSUE IS NOT RELEVANT TO THIS CASE 5

III. SIZE OF FUTURE CURE AWARD IS NOT RELEVANT TO DISBURSEMENT OF SUBROGATION PROCEEDS 6

IV. FUTURE CURE SETTLEMENT ISSUE IS NOT RELEVANT TO ISSUE IN THIS CASE 8

V. AMOUNT OF FUTURE CURE RECOVERED BY SEAMAN NOT AN ISSUE IN SUBROGATION DISBURSEMENT CASE 9

VI. CHARACTERIZATION OF SETTLEMENT FUNDS IMMATERIAL TO SUBROGATION RIGHTS OF INSURORS 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES **Page**

American Dredging Co. v. Miller
510 U.S. 443, 114 S.Ct. 981, 127
L.Ed. 285 (1994) 5

Bertram v. Freeport McMoran, Inc.
35 F.3d 1008 (5th Cir. 1994) 1

Calmar SS Corp. v. Taylor
303 U.S. 525, 58 S.Ct. 651,
82 L.Ed 993 (1938) 6,7

Fitzgerald v. United States
Lines Company
374 U.S. 16, 83 S.Ct. 1646,
10 L.Ed.2d 720 (1963) 6

Highlands Insurance Company v.
New England Insurance Company
811 S.W.2d 272 (Tex. App.-
San Antonio 1991, *no writ*) 8

Highlands Insurance Company v.
New England Insurance Company
811 S.W.2d 276 (Tex. App.- San
Antonio 1991, *no writ*) 8

Hughes v. Santa Fee International
Corp.
847 F.2d 239 (5th Cir. 1988) 7

Lirette v. K & B Boat Rentals, Inc.
579 F.2d 968 (5th Cir. 1978) 7

Southern Pacific Co. v. Jensen
244 U.S. 205, 37 S.Ct. 524,
61 L.Ed 1086 (1917) 5

Wilbur Boat Co. v. Fireman's Fund Insurance Co.
348 U.S. 310, 75 S.Ct. 368,
99 L.Ed 337 (1955) 4,5

OTHER AUTHORITIES

16 COUCH ON INSURANCE
§61:48, at 133 (2d Ed, 1983) 3,8

STATEMENT OF THE CASE

This case involves an issue of state law concerning how the proceeds of a marine insurance subrogation recovery is to be divided between the primary and excess insurance carriers.

1. Marine Fueling, Inc. had a $1,000,000.00 primary Protection and Indemnity Policy with Sphere Drake Underwriting Management Ltd. (Sphere Drake) and an excess policy with Royal Insurance Company of America (Royal).

2 A Seaman employee of Marine Fueling, Inc. was seriously injured aboard one of Marine Fueling, Inc.'s towboats. The total cost of maintenance and cure, settlement, legal fees and other expenses incurred by Marine Fueling, Inc. to resolve the seaman's claim was $3,987,065.55. Included in this figure was $1,065,072.37 paid by Marine Fueling, Inc. to the seaman and his medical providers for maintenance and cure, and an additional $1,000,000.00 paid to the seaman in settlement of his future maintenance and cure claim.

3. Marine Fueling, Inc. paid its deductible, Sphere Drake paid its primary limits and Royal paid all over Sphere Drake's $1,000,000.00 primary limits.

4. Marine Fueling, Inc. made a claim against certain third-party tortfeasors who were responsible for the seaman's injury, as allowed under applicable maritime law (*see Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994)), to recover the maintenance and cure it paid to and on behalf of the seaman. A total of $1,060,000.00, or approximately

99.5% of its maintenance and cure outlay before settlement with the seaman, was recovered under the terms of a settlement with the third-party tortfeasors.

5. Although the seaman did enter into settlements with the third-party tortfeasors, the settlements were not all "contemporaneous" with his settlement with Marine Fueling, Inc., as stated by Sphere Drake. Several months expired after his settlement with Marine Fueling, Inc. before his settlement with the last third-party tortfeasor.

6. Both Sphere Drake and Royal intervened in the case asking for the subrogation proceeds and filed Motions for Summary Judgment.

7. While Sphere Drake's policy makes no provisions for distribution of subrogation proceeds, the Royal policy provides:

> Inasmuch as this Policy is "Excess Coverage", the Assured's right of recovery against any person or other entity cannot be exclusively subrogated to the Underwriters. It is, therefore, understood and agreed that in case of any payment hereunder, the Underwriters will act in concert with all other interests (including the Assured) concerned, in the exercise of such rights of recovery. The apportioning of any amount which may be so recovered shall follow the principle that any interests (including the Assured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them: the Underwriters are then to be reimbursed out of

> any balance then remaining up to an amount paid hereunder: lastly, the interest to claim the residue, amounts shall be apportioned between the interest (including the Assured) concerned in the ratio of their respective recoveries as finally settled.

7. The Trial Court granted judgment for Sphere Drake. Royal appealed and the Texas Ninth Court of Appeals reversed the trial court and held that Royal is entitled to the entire subrogation recovery. The Texas Supreme Court denied Sphere Drake's Petition for Review.

REASONS FOR NOT GRANTING THE WRIT

The Texas courts properly decided this insurance subrogation issue based on Texas law. In fact, the decision is in accordance with the law in most jurisdictions.

> Where the insurers' coverage is in the nature of layers, the excess carrier should recover under subrogation before primary insurers can be reimbursed. One can look at a subrogation recovery as reducing the net loss, in which case the excess carriers would not be obligated to pay the loss. 16 COUCH ON INSURANCE §61.48, at 133 (2d Ed, 1983).

Certainly the issues between Marine Fueling, Inc. and the injured seaman, those between the injured seaman and the third-party tortfeasors and those between Marine Fueling, Inc. and the third-party tortfeasors were maritime issues. However, neither Marine Fueling, Inc., the injured seaman

nor the third-party tortfeasors are parties before the Court in this action. The only parties are two insurance companies and the only issue is the application of an insurance policy provision. The issue regarding how to apportion the subrogation recovery between the primary and the excess carrier is not a federal maritime law issue. *Wilbur Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L.Ed. 337 (1955), provides that state laws govern marine insurance contracts unless there is an entrenched federal maritime law on point. Sphere Drake has cited no federal maritime law, entrenched or otherwise, governing the distribution of subrogation proceeds between primary and excess insurance carriers.

The issue as posed by Sphere Drake ("whether Jones Act settlement monies can be characterized as future cure...") is simply not material to this case, which only concerns distribution of subrogation proceeds between insurance carriers. Sphere Drake has cited no cases that suggest that the issue of how to distribute subrogation proceeds between insurance carriers is a federal maritime law issue.

The Texas court's decision has absolutely no bearing on the Jones Act, the law of maintenance and cure, or any other maritime remedy. The decision dealt only with an insurance subrogation issue and was properly decided under Texas law.

I. THE TEXAS COURT WAS CORRECT IN APPLYING STATE LAW

Sphere Drake reasons that, "Since the amount of money recoupable by Marine Fueling and its maritime insurer was peculiarly constrained by substantive maritime law, it follows that the subsidiary question of how the

recouped money is divided between Marine Fueling's subrogated maritime insurer must also be constrained by substantive maritime law." No law is cited for this novel reasoning. This attempt to pull the insurance subrogation issue in this case into the arena of federal maritime law by association is without logic. The insurance subrogation issue here is one that has been consistently handled under state law since *Wilburn Boat*.

Contrary to Sphere Drake's assertions, the Texas courts' decision in this insurance subrogation case does not in any way change maritime law. Certainly, it is not the kind of state remedy that works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations as discussed in *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). The state remedy the Texas court applied in this case does not conflict in any way with the general maritime law.

It is interesting to note that while Sphere Drake argues that the court should apply federal maritime law, it cites no federal admiralty rule concerning how subrogation proceeds are to be divided between primary and excess carriers.

II. FUTURE CURE ISSUE IS NOT RELEVANT TO THIS CASE

Sphere Drake's protracted discussion of how much maintenance and cure the seaman was entitled to is not a consideration in determining the issue before the Texas courts. That issue simply concerns how to disburse the proceeds of a subrogation recovery, a clear state law issue.

Wilburn Boat, supra. The maritime issues were disposed of when the various settlements were funded. Additionally, Sphere Drake's argument is apparently based on the false premise that Marine Fueling, Inc.'s settlement with the seaman was "contemporaneous" with the seaman's settlement with all of the third-party tortfeasors. As set out above, that was not the case. While the seaman did settle his future maintenance and cure claim against Marine Fueling, Inc. (for $1,000,000.00) at the same time he settled his negligence claim against Marine Fueling, Inc. (for $1,800,000.00), the settlements with most, if not all of the third-party tortfeasors came later.

The court, in *Fitzgerald v. United States Lines Company*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963), did not, as Sphere Drake seems to suggest, in any way diminish the right of a seaman to maintenance and cure. The court, in *Fitzgerald*, simply held that a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts. To the contrary, in footnote 6, the *Fitzgerald* court notes that recovery of maintenance and cure does not bar a seaman's subsequent action under the Jones Act.

III SIZE OF FUTURE CURE AWARD IS NOT RELEVANT TO DISBURSEMENT OF SUBROGATION PROCEEDS

Again, Sphere Drake's discussion of how much maintenance and cure the seaman was entitled to was not material to the issue before the Texas courts. However, it should be noted that in the case cited by Sphere Drake, *Calmar SS Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938), the court actually said:

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can definitely be ascertained.

In 1978, the Fifth Circuit, in *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968 (5th Cir. 1978), in discussing the award for future maintenance and cure, explained:

> "Courts since *Calmar* have treated this principle largely as a matter of proof.... When the award is supported by a physician's testimony, however, courts have granted future maintenance...".

It is a reasonable assumption that the third-party tortfeasors felt that a substantial amount might be shown to be needful when they entered into the settlement with Marine Fueling, Inc.

The seaman's acceptance and signature on the future maintenance and cure release on its face belies Sphere Drake's outside the record assertion that "...at the time of the payment, Allemand did not need and was not requesting any $1.0 million lump sum future cure payment."

The courts not only allow awards for future maintenance and cure, as set out in the above cases, but also recognize the distinction between recoveries for negligence and for maintenance and cure made by settling parties. *See, Hughes v. Santa Fe International Corp.*, 847 F.2d 239 (5th Cir. 1988). There is simply nothing unique about the settlement with the seaman that gave rise to the subrogation recovery in this case.

IV FUTURE CURE SETTLEMENT ISSUE IS NOT RELEVANT TO ISSUE IN THIS CASE

Again, Sphere Drake emphasizes the maintenance and cure quantum issue, an issue that was resolved by Marine Fueling, Inc.'s settlement with the third-party tortfeasors, and not material to this case.

If Sphere Drake's argument is adopted, the primary insurer will always recover under subrogation in a case involving maintenance and cure before the excess insurer because, historically, and in a logical sequence, maintenance and cure payments will always be paid before a settlement on any negligence or related claim. Maintenance and cure payments begin immediately after the seaman's injury and continue until the seaman has reached maximum medical improvement. Trial or settlement of the negligence and related claims logically follow at a later time. If Sphere Drake's arguments are to be adopted, excess insurors would likely never participate in a subrogation recovery from third-party tortfeasors. Yet, it is settled law in Texas that the top layer of coverage is to be reimbursed first. *See, Highlands Insurance Company v. New England Insurance Company*. 811 S.W.2d 272 (Tex.App. - San Antonio 1991, *no writ*), and a related case, *Highlands Insurance Company v. New England Insurance Company*, 811 S.W.2d 276 (Tex.App. - San Antonio 1991, *no writ*). Sphere Drake is asking the Court to reverse years of settled law not just in Texas but throughout the country. *See*, COUCH ON INSURANCE, *supra* at 133.

V AMOUNT OF FUTURE CURE RECOVERED BY SEAMAN NOT AN ISSUE IN SUBROGATION DISBURSEMENT CASE

The Texas court simply applied the policy provision and horn book law and considered the $1,060,000.00 subrogation recovery as a reduction of Marine Fueling, Inc.'s net loss, and thereby reducing the loss which Royal was obligated to pay.

There is simply nothing in the state or federal maritime law that is authority for the proposition that which insurance company physically paid the medical provider's invoice or the seaman's maintenance bears any relationship to how the third-party recovery is to be distributed among the subrogeés.

Although medical provider's invoices are sometimes paid directly by the insurance carrier for more expeditious administration of the loss, the maintenance and cure is owed to the seaman by the employer, in this case Marine Fueling, Inc. Any recovery back from third parties by Marine Fueling, Inc. simply goes to reduce the net loss. Marine Fueling, Inc.'s net loss, of course, determines what the primary and excess carriers ultimately pay. The final result of the Texas courts decision here was that of the money expended by Marine Fueling, Inc. ($3,987,065.55 less recovery of $1,060,000.00 = $2,927,065.55), Sphere Drake paid its primary limits and Royal paid all in excess thereof. That is exactly what the policies were designed to do.

If Sphere Drake's argument is adopted, Sphere Drake will totally avoid its contractual obligation to pay the first $1,000,000.00 of its insured's $2,927,065.55 loss. This is clearly contrary to its obligation as the primary insurer.

VI CHARACTERIZATION OF SETTLEMENT FUNDS IMMATERIAL TO SUBROGATION RIGHTS OF INSURORS

Neither the case law discussed by Sphere Drake nor the policy language place any importance on the "characterization of settlement monies" in determining the apportionment of subrogation proceeds among insurance carriers. The excess carrier would be entitled to the entire subrogation proceeds in this case regardless of the allocation of the settlement funds paid to the seaman simply because the recovery reduced the net loss and, consequently, the excess carrier's obligation to pay.

Sphere Drake has cited no authority or logical reason for the proposition that identifying the amount of maintenance and cure in a seaman's settlement is relevant to anything other than determining how much could be recovered by the seaman's employer from the third-party tortfeasors. That issue was resolved when the settlement was made between Marine Fueling, Inc. and the third-party tortfeasors for $1,060,000.00.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Cecil L. Solomon
Counsel of Record
Billings & Solomon, P.C.
460 Riviana Building
2777 Allen Parkway
Houston, Texas 77019-2129
(713) 528-2111
(713) 528-0980 (facsimile)

Attorney for Respondent
Royal Insurance Company
of America